Exhibits - Getting Them in and Keeping Them Out

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The South Carolina Rules of Evidence provide scant help in the mechanics of actually introducing exhibits into evidence. Rule 602 requires that a witness is required to have "personal knowledge" of the matters about which the witness testifies. Rules 901 and 902 both deal with how exhibits are authenticated. But none of the rules have explained the process. This article is intended to explain the mechanics of introducing exhibits, some problems with authentication, problems with the business records act and what is exactly needed in a chain of custody. Much of what is discussed here will depend upon the particular preference of the judge involved. There is no guaranteed that any two judges will set forth the same requirement as to the introduction of the exhibits.

Obviously when a document is intended to be introduced, something more than a simple question of "Do you recognize this?" with the answer being "yes" is required. No judge will admit such a document. On the other hand, an explanation of what document is can go too far. For example, in response to the question "What is this document?" an answer that explains that the document is a receipt from an ATM machine that shows the witness was in Columbia on the date and time on the receipt and therefore could not have been in Greenville at the time of the robbery goes too far.

To properly admit a document the witness must be asked if they can identify the document which requires a simple yes or no answer. Then the witness is asked what is the

document to which the witness need only generally describe the document. "This is the receipt given to me when I withdrew money form the ATM machine on June 12, 2009." That is enough to authenticate the document. From that answer the basic document is described and why the witness has the document. That authenticates the document.

Problems sometime arise when a witness is asked to identify a document that the witness can read and say what it is but has no personal knowledge basis for knowing the genuineness of the document. Simply because a person can read the document and know it is a receipt or a letter does not make that person one who can authenticate the document for admissibility purposes. I have seen trials where a witness is given a letter that does not directly involve the witness and the lawyer will attempt to introduce the letter through that witness. The witness has to be able to authenticate the document is some manner other than being able to read it and know what it is.

In some cases a document is admitted simply because it is found at a location. If an address book is found at the house during the search the officer does not necessarily know that the address book is genuine but simply testifies as to what was found during the search. The importance of the exhibit is that it was found at the location. On that basis alone it will be admitted.

The person who is shown any exhibit must have some basis from his personal knowledge to authenticate the exhibit and its relevance to the issues before the court. The hoops that must be jumped through are not that difficult, although some judge try to make them so. Authentication by a witness is not the same as chain of custody. That question will be discussed subsequently.

Rule 902 provides for the self-authentication of many documents. The list permits many common items to be introduced such as certified public records, newspapers and periodicals. Newspapers and periodicals can present some confrontation clause problems when the state seeks to introduce the documents. When the defense seeks to introduce the document no such problem is presented. The confrontation clause is there for the protection fo the defendant not the government.

The most interesting exception that has some potential for helping the defendant is the Official Publication exception. That exception provides as follows: "Books, pamphlets, or other publications purporting to be issued by public authority." Thus, if there is any government publication that has language that helps your case, it comes into evidence. This can be used to introduce any document produced by the National Transportation Safety Board concerning the use of field sobriety tests or the Department of Justice concerning the proper way to gather evidence or run a laboratory. The limit is your imagination as there are numerous government publications in existence.

Rule 901 has some interesting rules concerning the identification of documents. It permits a lay person who is familiar with the writing of a particular person to testify as to genuineness of the handwriting. Voice identification is also included under that rule. The rule makes identifying a voice a relatively simple task, perhaps too easy. All that is required is for the witness to have heard the voice under any circumstances that connected the voice to the speaker.

Business Records Act

South Carolina Code § 19-5-510 contains what is commonly known as the business records act. We all know the act exists. What most do not realize is the application of

the act is limited. Not all records that are kept in the course of a business are admissible under the Business records Act. The act permits only those items that record "an act, condition, or event" to be admissible. Thus, the act clearly does not permit opinions and excludes some observations. The words "condition" and "event" are easily understood. The would include such things as weather conditions, when certain material arrived or was shipped or when a meeting was held. Those are events and conditions. The word "act" is not as easy to define. Clearly it would include what surgery was performed. But would it would not included the reason for the surgery as that is not an event, condition or act. The statements by a person would be included only if they in fact one of the listed reasons for admitting them.

Even if the document is admissible as a business records act, the person seeking to admit the document must still comply with the requirement that the document must be presented by a person who regularly maintains those records. The witness must have knowledge concerning the identity of the document, the mode of preparation and that it was made in the regular course of business. The witness need not be the person who actually recorded the information.

South Carolina has two case that are a good place to start in understanding this act. *State v. Anderson,* 386 S.C. 120, 687 S.E.2d 35 (2009) and *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987) both involved the use of prior fingerprint cards that allegedly contained the defendant's fingerprints. *Anderson* held the state had established the required proof under the business records act. In *Rich* the court held that the required proof had not been established. *Anderson* also contains a good discussion about authentication of documents under Rule 901. *See, also Ganster v. Western Pennsylvania Water Company*, 349 Pa. Super. 561, 504 A.2d 186

(1986)(holding conclusions and opinions are not admissible under the Business Records Act as an exception to the hearsay rule.)

An issue that has not been decided in South Carolina and very few other states is can the Business records Act violate the decision of *Crawford v. Washington*, 541 U.S. 36 (2004). *See, State v. Cao,* 175 N.C. App. 434, 626 S.E.2d 301 (2006) (holding that *Crawford* applies to some business records). If the act as passed in South Carolina is properly interpreted, this will be difficult as under the South Carolina as only acts, events or conditions. But this is not to say it can never apply. When researching this issue be careful about the wording of the statute in other states. Not all states use the same wording as South Carolina. To the extent that another state use different language then the holding of that state will be of little value in South Carolina.

Chain of Custody

The first issue in attacking the chain of custody is to determine if the item seeking to be introduced is a fungible or non-fungible goods. A fungible item is one that is uniform as it relates to other such substances. This would include drugs, blood, fingernail scrapings, and so forth. There is simply nothing to make them unique in and of themselves. Fungible items require a strict chain of custody. *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (2007). Non-fungible good, that are unique in and of themselves, do not require the same strict chain of custody. As the South Carolina Supreme Court has said:

> If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a

> substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain of custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with.
> *State v. Glenn* 328 S.C. 300, 305-306, 492 S.E.2d 393, 395 (Ct. App.,1997)

The best example of a non-fungible item is anything with a serial number. Unless the validity of the serial number is called into question, the serial number alone will make the item admissible without having to prove a strict chain of custody. The fact that the item may have been left unattended or in a place that is not secure does not affect the admissibility of the item, unless the validity of a serial number is called into question.

Some items that are technically non-fungible still should require a proper chain of custody. For example, a pocket book can frequently be identified by the owner through scratches of stains on the pocket book. But if the value of the pocket book is because something is found on it such as a body fluid, then a complete chain should be required because the state would have to show that the body fluid was not put on the pocketbook after it was seized by the police. If the pocketbook is left unsealed in an unsecured area before it is tested, then a question can be raised as to whether the body fluid was placed on the item at a later time and was not placed on it as part of the crime.

The state is not required to produce the name of every person who touched the item. Nor is the defendant if he seeks to introduce an item that has been tested. The standard is "so far as practicable." This means that if an item is sealed and shipped out of state and received

in the same sealed condition then neither the state nor the defendant needs to prove the identify of every person who handled the item while is was shipped. Such a burden would be impossible. All that is required is proof that the item was securely sealed in a manner that prevented tampering and was received in the same condition. That testimony is essential to make the testimony admissible.

State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001) is perhaps the outer limit of what is deemed to be a proper chain of custody. In *Carter* blood and saliva samples were taken at a local hospital and placed in a SLED rape kit and sealed. The doctor testified that he took all the samples required and placed the notation on the box as to blood and saliva. When the box arrived at the SLED lab, the box contained no saliva. Instead of simply stopping the process and questioning the lack of the saliva sample, the SLED technician simply marked through the saliva and proceeded to conduct the DNA on the blood. The significance of the missing saliva was the fact that a dispute arose at trial as to whether the substance tested on the pillow case was semen or saliva.[1]

The courts in South Carolina frequently say "where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." *Id*. at 425, 544 S.E.2d at 838. The question that has not been answered in South

[1] An interesting question is raised as to why both blood and saliva was needed to conduct a DNA test. All that was needed was blood. Testing saliva would not provide any more information as to DNA. Also, a lesson to be learned from the case is that there is no need for the state to have in its possession any body fluids from the defendant until the state has conducted its complete DNA test on the sample. What would have been the result in the OJ Simpson case had the state waited until it had completed its DNA tests before asking for Mr. Simpson's blood sample? The defense would have been precluded from arguing cross contamination. We do not know what the result would have been. We simply know that the question as to whose DNA was at the crime scene would have been definitively answered.

Carolina is what jury charge should be given to the jury to explain this credibility question. If the chain of custody is called into question then the jury should be instructed that if they find that the state has not effectively proven the chain of custody then the evidence should ne excluded from their consideration.